

**SANITIZED DECISION – 05-554 RTC – BY ROBERT W. KIEFER, JR. ALJ –  
SUBMITTED for DECISION ON APRIL 21, 2006 – ISSUED on OCTOBER 20, 2006**

**SYNOPSIS**

**TELECOMMUNICATIONS TAX – SILENCE OF STATUTE ON SPECIFIC ISSUE--**W. Va. Code § 11-13B-2(5) is silent on the issue of the year to which the determination of the Public Service Commission respecting whether or not commodities and services are subject to competition applies.

**TELECOMMUNICATIONS TAX – VALIDITY OF LEGISLATIVE RULE ADDRESSING SPECIFIC ISSUE NOT ADDRESSED BY STATUTE--**The legislative rule promulgated by the State Tax Commissioner to address the issue that was not addressed by W. Va. Code § 11-13B-2(5), specifically W. Va. Code St. R. § 110-13B-2.6 (Apr. 4, 1988), is based on a permissible construction of the statute, and in promulgating the rule, the Tax Commissioner did not act arbitrarily or capriciously.

**TELECOMMUNICATIONS TAX – APPLICATION OF REASONBLE LEGISLATIVE RULE ON SPECIFIC ISSUE NOT ADDRESSED BY STATUTE--**In accordance with the Tax Commissioner's legislative rule, W. Va. Code St. R. § 110-13B-2.6 (Apr. 4, 1988), the determination of the Public Service Commission respecting whether or not commodities and services are subject to competition, made pursuant to W. Va. Code § 11-13B-2(5), is applicable to the succeeding calendar year.

**FINAL DECISION**

On June 3, 2005, the Petitioner, filed a claim for refund of telecommunications tax in the amount of \$ for calendar year 2004. By letter dated August 16, 2005, the State Tax Commissioner's Office ("the Commissioner" or the "Respondent") denied the claim for refund.

Thereafter, by mail postmarked October 15, 2005, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for refund. W. Va. Code §§ 11-10A-8(2) [2002] and 11-10A-9 [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioner. Thereafter, the parties entered into joint stipulations of fact.

**FINDINGS OF FACT**

On January 10, 2006, pursuant to Rule 47 of the Office of Tax Appeals' ("OTA's") Rules of Practice and Procedure, W. Va. Code St. R. § 121-1-47 (Apr. 20, 2003), the Petitioner and the [Respondent State Tax Commissioner] (collectively referred to herein as the "Parties"), entered into joint stipulations of fact, as follows:

1. The Petitioner provides telecommunications and other services throughout its service area in West Virginia. The Petitioner's service area includes all or portions of 40 counties. Attached [to the original of the stipulations] as Exhibit 1-J is a list showing the counties in which the Petitioner provided telecommunications services and the number of telephone lines it served in each county as of March 31, 2005.

2. Although the number of telephone lines the Petitioner serves varies daily, the data shown in Exhibit 1-J is substantially similar to such data for the end of Tax Year 2004.

3. The Petitioner is subject to the Telecommunications Tax provided for in Chapter 11, Article 13B of the West Virginia Code.

4. The Public Service Commission of West Virginia ("PSC") designated "A" as an additional eligible telecommunications carrier ("ETC") throughout the entirety of the Petitioner's service area on November 15, 2001, in Case No. 01-0488-T-PC. A true and correct copy of the order is attached to [the original of] the Joint Stipulations of Fact as Exhibit 2-J.

5. The PSC designated "B" as an additional ETC in portions of the Petitioner's service area on August 27, 2004, in Case No. 02-1453-T-PC. A true and correct copy of the order is attached to [the original of] the Joint Stipulations of Fact as Exhibit 3-J.

6. The PSC designated "C" as an additional ETC in portions of the Petitioner's service area on August 27, 2004, in Case No. 03-0935-T-PC. A true and correct copy of the order is attached to [the original of] the Joint Stipulations of Fact as Exhibit 4-J.

7. The PSC designated “D” as an additional ETC in portions of the Parties’ service area on August 27, 2004, in Case No. 03-0305-T-PC. A true and correct copy of the order is attached as to [the original of] the Joint Stipulations of Fact Exhibit 5-J.

8. Designation of ETCs by the PSC is governed by 47 U.S.C §§ 214(e) and 254, and by rules of the Federal Communications Commission found in 47 C.F.R. Part 54.

9. On September 29, 2003, the PSC issued an order in Case No. 03-0781-T-GI recertifying ETCs for calendar year 2004. A true and correct copy of the order is attached to [the original of] the Joint Stipulations of Fact as Exhibit 6-J.

10. Annual recertification of ETCs by the PSC is governed by 47 U.S.C. § 254 and by rules of the Federal Communications Commission found in 47 C.F.P. Part 54.

11. Tax Year 2003 is the period from January 1, 2003 to December 31, 2003.

12. Tax Year 2004 is the period from January 1, 2004 to December 31, 2004.

13. Tax Year 2005 is the period from January 1, 2005 to December 31, 2005.

14. On December 31, 2003, the PSC issued a Commission order in Case No. 03-1359-T-GI (“2003 PSC Order”) in which it listed 63 separately enumerated services or commodities that it found to be subject to competition. A true and correct copy of the 2003 PSC Order is attached to [the original of] the Joint Stipulations of Fact as Exhibit 7-J.

15. On December 23, 2004, the PSC issued a Commission Order in Case No. 04-1082-T-GI (“2004 PSC Order”) in which it listed 66 separately enumerated services or commodities that it found to be subject to competition. A true and correct copy of the 2004 PSC Order is attached to [the original of] the Joint Stipulations of Fact as Exhibit 8-J.

16. By letter dated February 9, 2005, the [Respondent State Tax Commissioner] duly granted the Petitioner an extension of time until June 30, 2005, to file its [Petitioner’s]

Telecommunications Tax Return for Tax Year 2004 (“Return”). A true and correct copy of the letter is attached to [the original of] the Joint Stipulations of Fact as Exhibit 9-J.

17. Petitioner timely and duly filed its Return under cover of a letter dated June 3, 2005. A true and correct copy of the Return is attached to [the original of] the Joint Stipulations of Fact as Exhibit 10-J.

18. For Tax Year 2004, the Petitioner calculated its Gross Income subject to the Telecommunications Tax to be \$. The Petitioner s also calculated its tax liability to be \$ after application of credits, and requested a refund in the amount of \$.

19. By a letter dated June 7, 2005, the [Respondent] requested additional documentation regarding the Petitioner’s calculation of Gross Income on the Return. A true and correct copy of the letter is attached to [the original of] the Joint Stipulations of Fact as Exhibit 11-J.

20. By a letter dated June 23, 2005, Petitioner timely responded to the [Respondent’s] June 7, 2005 letter. The parties explained therein that it had relied upon the 2004 PSC Order to calculate its Gross Income of the Return. A true and correct copy of the letter is attached to [the original of] the Joint Stipulations of Fact as Exhibit 12-J.

21. The Parties excluded from Gross Income on the Return the gross income it received during Tax Year 2004 from providing the 66 services or commodities identified in the 2004 PSC Order as being subject to competition.

22. By letter dated July 26, 2005, the [Respondent] acknowledged receipt of the documentation it had requested in its June 7, 2005, letter, and instructed the Petitioner to disregard its June 7, 2005, letter. A true and correct copy of the letter is attached to [the original of] the Joint Stipulations of Fact as Exhibit 13-J.

23. By a letter dated August 16, 2005, the [Respondent] denied the Petitioner's request for a refund for Tax Year 2004 on the basis that the Petitioner should have applied the 2004 PSC Order to its Telecommunications Tax Return for Tax Year 2005 rather than to its Return for Tax Year 2004. A true and correct copy of the letter is attached to [the original of] the Joint Stipulations of Fact as Exhibit 14-J.

24. Except as described in paragraph 23 herein, the [Respondent] does not dispute the Return.

25. For Tax Year 2004 and previously, the Petitioner consistently has calculated the Gross Income on its Telecommunications Tax Returns by applying the PSC's list of services and commodities subject to competition to the tax year for which the services were found to be subject to competition.

26. The [Respondent] did not challenge the Petitioner's calculation of Gross Income on its annual Telecommunications Tax Returns for years prior to Tax Year 2004.

27. The [Respondent] has not audited or otherwise examined the Petitioner's Telecommunications Tax Returns for tax years prior to 2004.

28. The [Respondent] is without sufficient resources to audit or otherwise to examine each and every tax return filed by taxpayers with respect to the myriad taxes administered by the [Respondent].

29. All documents or copies of documents attached [to the original of the stipulations] as Exhibits are admissible and should be admitted into evidence.

## **DISCUSSION**

The first issue is whether or not W. Va. Code § 11-13-2 is clear and unambiguous insofar as it defines what constitutes gross income of a telephone or telecommunications carrier for a particular tax year. W. Va. Code § 11-13B-2 provides the following definitions:

**(5) Gross income.** – The term "gross income" of a telephone company or communications carrier shall be defined as all gross income received from the provision of local exchange or long distance voice or data communications services but shall not include gross income from the provision of network access, billing or similar services provided to end users, other telephone companies, or communications carriers: Provided, That on and after the first day of July, one thousand nine hundred eighty-eight, the term "gross income" of a telephone company or communications carrier shall not include gross income from the provision of commodities or services which shall be determined by the public service commission of West Virginia to be subject to competition. On or before the thirty-first day of December of each calendar year, the public service commission of West Virginia shall submit to the tax commissioner a listing of those commodities or services which it has determined to be subject to competition. Such listing shall constitute a conclusive determination for the purposes of defining "gross income" within the meaning of this subsection.

\* \* \* \*

**(9) Taxable year --** The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which tax liability is computed under this article. "Taxable year" means, in case of a return made for a fractional part of a year under the provisions of the article, or under regulations promulgated by the tax commissioner, the period for which such return is made.

The statute is clear and unambiguous insofar as it provides that the Public Service Commission is to make a determination respecting those commodities and services provided by telecommunications companies that are subject to competition. The statute provides that the list of commodities and services which are determined to be subject to competition shall be a conclusive determination. As such, it is binding on both the State Tax Commissioner and the parties to the Order.

In its orders entered December 31, 2003, and December 23, 2004, the Public Service Commission provided a list of items subject to competition. *See* Joint Exhibits Nos. 7-J & 8-J.

In its orders, the Public Service Commission also identified the tax year for which the list of telecommunications services are considered competitive. For example, on December 31, 2003, the Public Service Commission issued an order setting forth the list of those telecommunications commodities and services that are subject to competition. It further provided that the list of commodities and services identified therein were subject to competition for tax year 2003. Similarly, on December 24, 2004, the Public Service Commission issued an order setting forth the list of those telecommunications commodities and services that are subject to competition. It further provided that the list of commodities and services identified therein were subject to competition for tax year 2004.<sup>1</sup>

The Petitioner relies on the Orders of the Public Service Commission, wherein the orders entered in 2003 and 2004 state that the commodities and services were subject to competition for each of tax years 2003 and 2004, respectively. The Petitioner's argument basically follows the following logical steps:

- 1) The statute provides that the Public Service Commission shall make an annual determination respecting what commodities and services are subject to competition;
- 2) The statute further provides that the Public Service Commission's determination respecting commodities and services that are subject to competition is conclusive;
- 3) In its orders, the Public Service Commission stated that the list of commodities and services that were subject to competition were for the calendar year in which the orders were entered;
- 4) Because the Public Service Commission determined that the commodities and services were subject to competition for the year in which the orders were entered, its determinations in this respect were conclusive with respect to those tax years for purposes of the telecommunications tax.

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<sup>1</sup> In its order issued December 31, 2003, the Public Service Commission stated, "IT IS FURTHER ORDERED that the following telecommunications services be certified as competitive telecommunications services for the 2003 tax year and that a list of such services be submitted to the West Virginia Tax Commissioner pursuant to W. Va. Code § 11-13B-2(b)(5)." In its order issued December 24, 2004, the Public Service Commission stated, "IT IS FURTHER ORDERED that the following telecommunications services are certified as competitive telecommunications services for the 2004 tax year and that a list of such services be submitted to the West Virginia Tax Commissioner pursuant to W. Va. Code § 11-13B-2(b)(5)."

The State Tax Commissioner responds by arguing that nowhere in the definition of “gross income,” *supra*, is there any statement or specification as to the tax year to which the Public Service Commission’s determination respecting commodities and services subject to competition applies. Because the statute is silent as to what year the Public Service Commission’s determination applies, the statute, according to the Tax Commissioner, is ambiguous. The Tax Commissioner further contends that the ambiguity of the definition is highlighted by the fact that the Legislature provided a definition of “taxable year,” *supra*, but did not refer to the definition of “taxable year” in the definition of “gross income.” He points out that it would have been easy for the Legislature to expressly provide that the Public Service Commission’s determination would apply to a particular tax year. But, he argues, the silence of the Legislature with respect to this issue renders the statute ambiguous.

According to the State Tax Commissioner, because the statute is ambiguous with respect to this issue, he promulgated a legislative rule which establishes the taxable years to which the Public Service Commission’s orders apply. The legislative rule promulgated by the State Tax Commissioner, W. Va. Code St. R. § 110-13B-2.6 (Apr. 4, 1988), provides:

2.6. Gross income. The term "gross income" of a telephone company or communications carrier shall be defined as all gross income received from the provision of local exchange or long distance voice or data communication services but shall not include gross income from the provision of network access, billing or similar services provided to end users, other telephone companies, or communications carriers. *On or after July 1, 1988, the term "gross income" of a telephone company or communications carrier shall not include gross income from the provision of commodities or services which shall be determined by the Public Service Commission of West Virginia to be subject to competition. The Public Service Commission of West Virginia will submit to the Tax Commissioner, on or before December 31 of each calendar year, a listing of those commodities or services the trading in which it has determined to be subject to competition. Such listing shall constitute a conclusive determination for the purpose of defining "gross income" of a telephone company or communications carrier for the next succeeding calendar year. (Emphasis added.)*



In Syl. pt. 3, in part, *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 466 S.E.2d 424 (1995), with respect to the issue of whether a statute is clear and unambiguous, the Supreme Court held, “The court first must ask whether the Legislature has directly spoken to the precise question at issue.” As the Supreme Court stated in *Appalachian Power*:

[T]he question whether the Legislature has spoken on a particular question involves two smaller steps. We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed. As we noted in Syllabus Point 2, in part, of *Chico Dairy Company v. Human Rights Commission*, *supra*:

“Rules and Regulations of . . . [an agency] must faithfully reflect the intention of the legislature; when there is clear and unambiguous language in a statute, that language must be given the same clear and unambiguous force and effect in the . . . [agency's] Rules and Regulations that it has in the statute.” [Cite omitted.]”

If no such readily apparent meaning springs from the statute's text, we next examine, albeit skeptically, other extrinsic sources, such as the legislative history, in search of an unmistakable expression of legislative intent. “When a statute's language is ambiguous, a court often must venture into extratextual territory in order to distill an appropriate construction. Absent explicatory legislative history for an ambiguous statute . . ., this Court is obligated to consider the . . . overarching design of the statute.” *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. at 777, 461 S.E.2d at 523. And if, at that stage, the statute itself, viewed in connection with the statutory design and the legislative history, reveals an unequivocal answer to the interpretive question, the Court's inquiry ends.

*Id.* at 587, 466 S.E.2d 438.

A review of the statute demonstrates that “the Legislature [did not] directly [speak] to the precise question at issue.” The text of the statute, given its plain meaning, does not speak to whether the Order of the Public Service Commission applies to the calendar year in which the Commission enters its Order, or to the calendar year following the year in which the Public Service Commission enters its Order. The statutory language merely states that the Public Service Commission is to determine which commodities and services are subject to competition,

to do so by a specified date, and that its determination is conclusive.<sup>2</sup> There is no language by which the Legislature expressly stated the year to which the Public Service Commission's determination applies.

The Petitioner argues that the term "conclusive" in the statute makes the Public Service Commission's determination respecting the year in which commodities and services are competitive applicable to that particular tax year. However, there is no language in the statute to support this proposition, either express or implied. Instead, the Public Service Commission is limited to determining the status of commodities and services on a particular date, the date of its determination. The statute does not make the Public Service Commission's determination applicable to a particular tax year, nor does it make the Public Service Commission's determination conclusive with respect to any other issue, such as the year to which its Order is applicable. The language of the statute does not answer the precise legal question presented.

The next step is to determine whether there is some other extrinsic source, such as legislative history, that constitutes an unmistakable expression of legislative intent. Neither of the parties point to any extrinsic source that sheds light on this issue. This Office is not aware of any such source. Thus, this Office must conclude that W. Va. Code § 11-13B-2(5) is subject to interpretation because it does not address the issue of the tax year to which the Public Service Commission's determination applies. This determination must be made by the appropriate administrative agency. That is an issue that is more within the expertise of the State Tax Commissioner than the Public Service Commission.

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<sup>2</sup> The language in the statute making the Public Service Commission's determination conclusive refers only to whether goods and services are subject to competition. This serves the purpose of preventing the State Tax Commissioner from looking behind this determination of the Commission, which is within the particular expertise of the Commission, and not within the expertise of the State Tax Commissioner.

Since the first part of the analysis adopted by the West Virginia Supreme Court in *Appalachian Power* did not disclose an unmistakably clear expression of legislative intent, it is necessary to examine the State Tax Commissioner's interpretation, embodied in the legislative rule, to see how it relates to the statute. This examination involves a high degree of respect for the agency's role and, like the Supreme Court in *Appalachian Power*, this Office must give considerable deference to the Tax Commissioner's legislative rule. *Id.* at 587-88, 466 S.E.2d 438-39.

As the Supreme Court held in Syl. pt. 4, *Appalachian Power*:

If legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing a legislative rule. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. W. Va. Code, 29A-4-2 (1982).

In the present action, the statute is silent with respect to the issue of the year to which the Public Service Commission's Order applies.<sup>3</sup> The Tax Commissioner has addressed the silence of the statute by promulgating a legislative rule that addresses the gap in the statutory language. The rule promulgated by the Tax Commissioner provides that the determination of the Public Service Commission is to be prospective; that is, it is to apply to the following tax year. Stated differently, it is not to be applied retrospectively to the tax year in which it is issued. A review of the legislative rule promulgated by the State Tax Commissioner shows that it is certainly not arbitrary or capricious.

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<sup>3</sup> It may not be said that the statute is ambiguous, except insofar as it is silent with respect to the issue presented. The statute simply does not address the issue which is the subject of the dispute between the parties.

There is logic that supports the Petitioner's position. The Public Service Commission issues its Order late in the calendar year. Presumably, it bases its determination on facts that are in existence at the time that it issues its determination.<sup>4</sup> Since the facts existed during the calendar year, and since it is not a certainty that the same facts will exist in the succeeding calendar year, it would not defy logic to apply the Commission's determination to the calendar year in which the determined facts were certainly in existence.

On the other hand, there is logic to support the State Tax Commissioner's legislative rule. Application of the PSC's decision prospectively to the succeeding calendar year provides some certainty to the Tax Commissioner and the Legislature in estimating revenue from the telecommunications tax for the succeeding calendar year. The Legislature can appropriate the estimated revenue with some sense that its estimate is stable. It does not, as might have happened in this instance, have to anticipate issuing substantial refunds to taxpayers based on a determination by the Public Service Commission that occurs late in the calendar year. The issuance of substantial refunds to multiple taxpayers could substantially affect estimated and appropriated revenues in a deleterious manner.

In a similar vein, if the Petitioner's interpretation of the statute were used, a taxpayer would go through the entire tax year not knowing which of its commodities and services are taxable because they are not subject to competition, and which services are taxable because they are subject to competition. A taxpayer would be unable to predictably order its business for a particular taxable year because it would not know which commodities and services are taxable for a given tax year, and which are not, until late in the year. In recent years, it appears that the

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<sup>4</sup> Some commodities or services are subject to competition from the beginning of the year until the end of the year. Others began the year not subject to competition, but became subject to competition at some point during the year. Still others were subject to competition at the beginning of the year, but ceased being subject to competition during the year. But it is the facts in existence on the date of the determination that are important.

commodities and services subject to competition have increased each year, thereby reducing the number of commodities and services subject to the tax. This has benefited taxpayers by presumably reducing their tax burden from one year to the next.<sup>5</sup> However, if the commodities and services that are subject to competition decrease from one year to the next, the gross income from those commodities and services would become subject to the telecommunications tax. The gross income subject to the tax would increase. Thus, the taxpayer would not benefit, and would have a large tax burden at the end of the year.

Regardless of the logic of the parties' respective positions, this Office is limited to determining whether the State Tax Commissioner's interpretation is based on a permissible construction of the statute. His interpretation does not have to be the "best" construction, or the one that serves the statute in the most logical manner. *Appalachian Power*, at 588, 466 S.E.2d at 439. It need not be the one that this Office might have adopted had it been in the State Tax Commissioner's position. *Id.* at 591, 466 S.E.2d at 442. The legislative rule need only be one that flows logically from the statute. *Id.* at 588, 466 S.E.2d at 439. As previously discussed, his interpretation, as promulgated in the legislative rule and approved by the Legislature need only be one that flows logically from the statute. The Tax Commissioner did not act arbitrarily or capriciously in promulgating the rule, and did not exceed his constitutional or statutory authority. Thus, this Office must defer to the Tax Commissioner's interpretation of the statute.

This Office is mindful of the admonition of the Supreme Court that:

"A statute, or administrative rule, may not, under the guise of "interpretation," be modified, revised, amended or rewritten". Syl. pt. 1, *Consumer Advocate Div'n v. Public Serv. Comm'n*, 182 W. Va. 152, 386 S.E.2d 650 (1989).

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<sup>5</sup> This assumes gross income from each commodity and service remains relatively stable from year to year.

Syl. pt. 4, *CNG Transmission Corp. v. Craig*, 211 W. Va. 170, 564 S.E.2d 167 (2002); Syl. pt. 3, *Syncor Intern. Corp. v. Palmer*, 208 W. Va. 658, 542 S.E.2d 479 (2001). In this matter, however, this rule does not come into play. The statute is silent as to the issue of whether the Public Service Commission's Order applies retroactively to the year in which it is issued, or whether it applies prospectively to the year immediately succeeding. The Tax Commissioner's legislative rule has not "modified, revised, amended or rewritten" the statute; it has addressed an issue on which the statute is silent and, consequently, is ambiguous.

### CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the petitioner-taxpayer to show that it is entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002].
2. W. Va. Code § 11-13B-2(5) is silent on the issue of the year to which the determination of the Public Service Commission respecting whether or not commodities and services are subject to competition applies.
3. The legislative rule promulgated by the State Tax Commissioner to address the issue that was not addressed by W. Va. Code § 11-13B-2(5), specifically W. Va. Code St. R. § 110-13B-2.6 (Apr. 4, 1988), is based on a permissible construction of the statute, and in promulgating the rule, the Tax Commissioner did not act arbitrarily or capriciously.
4. In accordance with the Tax Commissioner's legislative rule, W. Va. Code St. R. § 110-13B-2.6 (Apr. 4, 1988), the determination of the Public Service Commission respecting whether or not commodities and services are subject to competition, made pursuant to W. Va. Code § 11-13B-2(5), is applicable to the succeeding calendar year.

### **DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's petition for refund of \$ of telecommunications tax, for calendar year 2004, is hereby **DENIED**.